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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

PABLO MAESE, JOSE L. LOPEZ, Dionicio Gonzales, and Jesus Maria Tafoya, appellants,
v.
BINGER HERMANN, COMMISSIONER of the General Land Office, and Ethan A. Hitchcock, Secretary of the Interior.
} No. 226.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

STATEMENT.

The present suit was brought in the supreme court of the District of Columbia, by Pablo Maese et al., to restrain the Secretary of the Interior and the Commissioner of the General Land Office from issuing a patent for certain lands to the town of Las Vegas or to any other than the heirs and assigns of the original petitioners for a grant of said lands, and to compel the issuance of a patent therefor to the heirs, legal representatives and assigns of such petitioners (Record, pp. 1–7). The lands are in the Territory of New Mexico and embrace 496,446.96 acres.

To the bill the defendants filed a demurrer upon three grounds (Record, pp. 8–9):

First. Want of substance or equity.

Second. Want of jurisdiction.

Third. Want of necessary parties.

The demurrer was sustained and a decree entered dismissing the bill. (Record, pp. 10–18.)

From this decree the complainants appealed to the court of appeals of the District of Columbia, where the decree appealed from was affirmed. (Record, pp. 20–34.)

From that decree of affirmance the complainants have appealed to this court.

The act of July 22, 1854 (10 Stat., 308), established the office of surveyor-general of New Mexico and by section 8 declared that it should be his duty "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico," and make full report on all such claims as originated before the cession of the territory to the United States, with his decision as to the validity or invalidity of each, which report was to be "laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants and give full effect to the treaty of 1848 between the United States and Mexico."

September 11, 1855, a petition was presented to the surveyor-general by "Francisco Lopez and Henry Connelly and Hilario Gonzales, on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity, in the county of San Miguel, Territory of

New Mexico," representing that they and the citizens they represented were the claimants and legal owners of a certain tract of land in said county, "which said land was granted by the provincial deputation of said Territory, in the year A. D. 1835, to Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, in their own behalf and that of twenty-five other inhabitants of said county," and praying "that their claim and title to said lands be examined as required by law, and that said grant be confirmed to them." The history of this grant, together with copies of documents, both originals and translations, upon which it is based, are to be found in House of Representatives Executive Document No. 14, Thirty-sixth Congress, first session, referred to and quoted from in appellants' brief.

The original petition was presented to the corporation of San Miguel Del Bado March 20, 1835, by Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Casaos, "for themselves and in the name of twenty-five men," for "a vacant and uncultivated piece of land commonly known as Las Vegas." This petition was sent by the corporation to the territorial deputation, which body, upon consideration thereof, ordered as follows: The land contained within the boundaries expressed in this petition is granted not only to the petitioners, but also generally to all who may be destitute of lands to cultivate," and directed that the proceedings be forwarded to the political chief to execute the order. The political chief directed the justice of El Bado to proceed according to the

directions of the deputation. The report of the justice sets forth that on April 6, 1835, he made distribution of the lands to the twenty-five individuals mentioned in the original petition "and in general to those who are without lands, not only those within this jurisdiction, but also anyone who may present himself to me who has no occupation." Attached to this report is a "list showing the number of individuals who occupy the new settlement entitled 'Nuestra Senora de los Dolores de Las Vegas,' and showing the number of yards of land each one has received." The list contains the names of thirty-one persons. June 11, 1841, another list was returned showing distributions made to one hundred and eighteen other persons. November 20, 1846, a further distribution was made to twenty-nine others and subsequently, a list containing the names of six others was returned.

This claim and that of the heirs of Luis Maria Baca, covering the same land, were examined by the surveyor-general and his conclusion submitted to Congress in a report headed: "The Heirs of Luis Maria Baca and the Town of Las Vegas." His conclusion was that either of the claims, in the absence of the other, would be a good and valid grant. The act of June 21, 1860 (12 Stat., 71), provided:

> That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstract marked Exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty

> to thirty-eight, both inclusive, be and the same are hereby confirmed. * * *

The exhibit referred to shows the names of claimants of the various claims, and as to No. 20 they are "Town of Las Vegas and Thomas Baca et al." The claimants under the Baca grant having signified a willingness to surrender their elder claim, provision was made for them in section 6 of said act of June 21, 1860, wherein it is provided:

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, etc.

A survey of the grant thus confirmed was made and the plat thereof approved by the surveyor-general December 8, 1860. The matter thus rested until 1887, when the then surveyor-general expressed the opinion that the survey formerly made included more ground than could be legitimately embraced in said grant. Thereafter various proceedings were had in the land department and in the courts, as set forth in 27 Land Decisions, 683, which resulted in the decision of the Secretary of the Interior there reported, holding "that said grant was confirmed to the town of Las Vegas for the full quantity of land embraced within the boundaries set forth in the original petition," and directing the issuance of a patent in accordance with the views therein expressed. The present proceedings were instituted to prevent the execution of the order so made.

ARGUMENT.

I.

COMPLAINANTS NOT ENTITLED TO EQUITABLE RELIEF.

They have failed to make it appear that the action which they seek to prevent will work any serious harm to them or any injury for which an adequate remedy can not be obtained in a court of law. They do not present a condition which entitles them to the writ of injunction.

Section 2447 of the Revised Statutes, which took effect December 1, 1873, and which speak from that date where not otherwise specifically provided, directs:

> In case of any claim to land in any State or Territory which has *heretofore* been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of a patent, it may be lawful, where surveys for the land have been or may hereafter be made, to issue patents for the claims so confirmed upon the presentation to the Commissioner of the General Land Office of plats of survey thereof duly approved by the surveyor-general of any State or Territory, if the same be found correct by the Commissioner. *But such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.*

This section was taken from the act of December 22, 1854 (10 Stat., 599), and may be, also, from the some-

what similar provision in the act of March 3, 1869 (15 Stat., 342), but since the revision the word "heretofore" as employed in the section obviously refers to the period of time preceding the taking effect of the revision. Had it been intended to limit the operation of the section to confirmations made prior to December 22, 1854, that date would have been inserted in the section as carried into the revision instead of the word "heretofore." This was the course pursued in other instances.

The act of June 21, 1860 (sec. 4), contains an express provision, as follows:

> That the foregoing confirmation shall only be construed as quitclaims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

Any patent that may be issued upon such confirmation would necessarily be subject to the same limitations, whether expressly set forth therein or not. It is immaterial, therefore, whether the patent in this case is to be issued under section 2447, Revised Statutes, or under the act of March 3, 1869. The character of the duties to be performed and the effect of the patent to be issued are the same. In neither case would any valid adverse right of any person be affected. Any such right could be asserted before any proper tribunal just as effectually as if such patent had not been issued. Appellants cite no authorities to the contrary, and there are none.

II.

THE SUPREME COURT OF THE DISTRICT OF COLUMBIA WAS WITHOUT JURISDICTION.

That the duties to be performed by the officers of the land department in connection with this grant involved the exercise of discretion and were therefore not merely and purely ministerial in character, is abundantly demonstrated by the facts. Two parties, the town of Las Vegas and Marcos Maese and others, as original grantees or their representatives, applied for patent. To ascertain the merits of the claims thus presented, required investigation extending not only to the confirmatory act, but to the report of the surveyor-general referred to in said act, and all the documents accompanying that report. To determine the rights of the respective claimants, it was necessary to construe the confirmatory act in the light of the reports and documents before Congress, which involved a decision as to the legal effect of such papers. Can it be said that these acts were merely ministerial? The decisions of this court cited by the complainants in support of their contention that the duty devolved upon the officers of the land department in this case are of the character that their manner of performance may be controlled by the courts is not sustained.

The cases of *Stoddard* v. *Chambers* (2 How., 284) and of *United States* v. *Stone* (2 Wall., 525) involved questions as to the effect of a patent already issued and claimed to have been issued contrary to law through inadvertence or mistake. No question of con-

trolling the action of executive officers in the issuing of patents was involved or discussed.

The case of *Stoddard* v. *Chambers* was ejectment, brought by plaintiff, who claimed under a Spanish concession confirmed by act of Congress, against a defendant who claimed under a patent issued upon a New Madrid location made under a Congressional enactment. The Spanish concession was, of course, the elder claim, but the New Madrid location was made and patent issued thereon before the confirmation by Congress of the concession. Lands included within such Spanish concessions were not subject to location with New Madrid certificates. In declaring the inconclusiveness of a patent issued for land not subject to appropriation under the law under which the patent is issued the court said (p. 318):

> No title can be held valid which has been acquired against law; and such is the character of the defendant's title, so far as it trenches on the plaintiff's. It has been argued that the first patent appropriates the land and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act which must be performed according to law. * * * It is true a patent possesses the highest verity. It can not be contradicted or explained by parol, but if it has been fraudulently obtained or issued against law it is void. It would be a most dangerous principle to hold that a patent should carry the legal title though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is

> a much more solemn act than the issuing of a patent. The patent of the defendant having been for land reserved from such appropriation, is void.

United States v. *Stone* was a suit to cancel a patent issued for land which was at the time embraced in a military reservation and therefore not subject to disposition. On behalf of the patentee it was contended (p. 529):

> The principal case in which the jurisdiction of chancery is affirmed to annul patents, at the suit of the sovereign, is put upon the ground of fraud practiced by the patentee. This is believed to be the only ground upon which the courts of chancery have heretofore taken jurisdiction in such cases. Admitting, however, that if the land were within the boundaries of any military reservation, a mere grant of it might be voidable, yet where the Commissioner of the General Land Office and the President declare, as they do here, that *they are acting "in conformity with the provisions of the treaty"* which authorizes grants only of lands *not* in such reservation, then the Government is concluded. It is estopped to say that the land was in a military fort. The discretion of saying what portion of these lands was open to patent is vested by the Government in its officers, and the discretion having been exercised honestly, the decision is conclusive upon the Government.

It was in response to this that the court said (p. 535):

> Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents

> are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and reqires the judgment of a court.

True, in each of these decisions the issuance of a patent is spoken of as a ministerial act, but the court did not mean by this that the issuance of a patent does not involve investigation or the exercise of judgment and discretion, or indeed that it is not a *quasi* judicial act. What was meant—and the decisions do not leave the matter in doubt—was that the issuance of a patent is not such a judicial act that, right or wrong and whether in conformity with or opposition to the law, it is conclusive upon the Government and adverse claimants. What was said and done by the court, and all that it could do or say under the facts in the cases before it, was that when the executive officers have proceeded to the accomplishment of the matter pending before them, then may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. The action of the court fully

conforms to the rule repeatedly announced and applied in the cases hereinafter cited.

In the case of *Roberts* v. *United States* (176 U. S., 221) it was sought to compel, by mandamus, the Treasurer of the United States to pay interest due upon certain bonds. In the course of that decision it was said (p. 229):

> The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question.

It was held that there the statute was clear and the duty of the Treasurer to pay the money to the relator was ministerial in its nature. If in that case there had been two parties claiming the money, as here there are two claiming the patent, and the Treasurer had decided which was entitled thereto, a very different question, but one more nearly like that presented here, would have been involved, and we venture, with great confidence, the assertion that the court would not have interfered by injunction or mandamus to control the action of the Treasurer and to compel him to reverse that decision.

Here the defendants have not refused to act, and hence there is no ground on that score for interference by the courts. On the contrary, they have, after a full examination of a large record involving complex

questions, decided that the patent should issue to the town of Las Vegas, one of the two claimants. It is now sought to substitute the judgment of the court for that of the executive officers. In the case of *Roberts* v. *United States* (*supra*) the court referred to the case of *United States* v. *Black* (128 U. S., 40) as stating the rule governing in such matters, and said:

> This case comes within the exception stated in the *Black case*, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the court will not interfere with the executive officers of the Government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose.

It is thus seen that the cases where the courts will interfere are within the exception rather than within the rule. It is submitted that this case is within the rule rather than the exception, and that the court below committed no error in refusing to interfere.

It has frequently been sought to have the courts interfere in such cases by mandamus, and the principles involved will be found to have been discussed in many cases of that character, while there are comparatively few where the remedy has been sought by way of injunction. The same doctrine, however, applies in both classes of cases. In the case of *Gaines* v. *Thompson* (7 Wall., 347) it was asked that the Secretary of the

Interior and the Commissioner of the General Land Office be prevented by injunction from canceling an entry under which Gaines and others claimed an equitable right to certain lands. The court, after referring to a number of cases where the extent of the jurisdiction of courts over officers of the Executive Departments of the Government had been discussed, including *Marbury* v. *Madison* (1 Cranch, 137); *McIntire* v. *Wood* (7 Cranch, 504); *Kendall* v. *United States* (12 Peters, 524); *Decatur* v. *Paulding* (12 Pet., 497); *Commissioner of Patents* v. *Whitely* (4 Wall., 522); *United States* v. *Seaman* (17 How., 225); *United States* v. *Guthrie* (17 How., 284), and *United States* v. *Commissioner of Land Office* (5 Wall., 563), said:

> It may, however, be suggested, that the relief sought in all those cases was through the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine, that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to

> interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.
>
> In the one case the officer is required to abandon his right to exercise his personal judgment and to substitute that of the court by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

It is not necessary to enter here upon a detailed statement of what has been said in the decisions of this court in the numerous cases coming before it in which the question under consideration was involved. In the case of *Redfield* v. *Windom* (137 U. S., 636, 643) the cases preceding it are named and the rule is clearly stated. It was there said:

> The principles upon which persons holding public office may be compelled by a writ of mandamus to perform duties imposed by law have been distinctly defined and strictly adhered to in a great number and variety of cases before this court. (*Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *United States*, 12 Pet., 524; *Decatur* v. *Paulding*, 14 Pet, 497; *Brashear* v. *Mason*, 6 How., 92, 101; *Goodrich* v.

Guthrie, 17 How., 284; *Ex parte De Groot*, 6 Wall., 497; *Georgia* v. *Stanton*, 6 Wall., 50; *Gaines* v. *Thompson*, 7 Wall., 397; *United States* v. *Seaman*, 17 How., 225, 230; *Ex parte Bradstreet*, 7 Pet., 634; *Harrington* v. *Holler*, 111 U. S., 796; *Reeside* v. *Walker*, 11 How., 272, 290; *United States* v. *Schurz*, 102 U. S., 378, 394, 395; *Butterworth* v. *Hoe*, 112 U. S., 50; *United States ex rel. Dunlap* v. *Black*, 128 U. S., 40.)

The principle is that the writ of mandamus may issue where the duty which the court is asked to enforce is plainly ministerial, and the right of the party applying for it is clear and he is without any other adequate remedy; and it can not issue in a case where its effect is to direct or control the head of an Executive Department in the discharge of an executive duty involving the exercise of judgment or discretion. The doctrine to be gathered from these cases, as well those in which mandamus was granted as those in which it was refused, especially from the two leading cases, *Kendall* v. *United States*, *supra*, and *Decatur* v. *Paulding*, *supra*, is thus enunciated in *United States ex rel. Dunlap* v. *Black*, *supra*, by Mr. Justice Bradley, who delivered the opinion of the court:

The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is

imposed upon them—that is, a service which they are bound to perform without further question—then if they refuse, a mandamus may be issued to compel them (p. 48).

It is proper here to remark, as applicable to the determination of this case, that, in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act. In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake (*United States* v. *Schurz*, *supra*), or where the case is one of doubtful right (*New York Life and Fire Ins. Co.* v. *Wilson*, 8 Pet., 291, 302), or in a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto, or where it will be attended with manifest hardship and difficulties (*People* v. *Forquer*, Breese [1 Ill.] 68, (2d ed., 104); *Van Rensselaer* v. *Sheriff of Albany*, 1 Cowen, 501, 512; *Oakes* v. *Hill*, 8 Pick., 46).

In the case of *Brown* v. *Hitchcock* (173 U. S., 473), the same doctrine is asserted. In delivering the opinion of the court Mr. Justice Brewer, among other things, says:

As a general rule, no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such departments and carried into the courts; those departments must

> be permitted to proceed to the final accomplishment of all matters pending before them. And only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.

The principles thus announced have been strictly adhered to in all subsequent cases. Applying the rules to the case under consideration, it will be found that it is one in which the courts should not and will not attempt to control the action of the executive officers.

III.

THERE IS A FATAL DEFECT OF PARTIES.

Even if this case were one which the court might, so far as the subject-matter is concerned, take jurisdiction of, yet the bill here is fatally defective because of the lack of proper and necessary parties. The bill alleges that the decision complained of, and the execution of which it is sought to prevent, was rendered upon a petition filed in the Interior Department asking that a patent be issued to the town of Las Vegas. The decision referred to (27 Land Decisions, 683) shows that there were conflicting claimants for said patent, and that it was rendered after a consideration of the respective petitions of the parties and of elaborate arguments, both oral and printed, in support of such petitions. In the face of these facts it is asked that the decision be vacated and set aside without notice to the other party to the controversy. Notwithstanding the strenuous contention of complainants that the case of *Litchfield* v. *Register and Receiver* (9 Wall., 575), cited in defendants' argument before

the court of appeals and referred to in the decision of that court, is not in any manner analogous to the present case, we insist that there are so many points of similarity as to justify reference thereto. In that case the register and receiver had no real interest in the matter, and in this case the defendants have no real interest. That case involved the performance of a duty cast by law upon the register and receiver, and this involves the performance of a duty by the defendants. There adversary parties had presented their claims to the officers, and here adversary parties have presented their claims. There the court refused to interfere to control the action of the officers, and here the lower courts have refused to interfere to control the action of the defendants. It is respectfully submitted that here, as there, the action of the lower courts should be affirmed.

Other cases were cited to the court of appeals in support of the proposition that the bill here is open to the objection that the necessary parties have not been brought into court, being *Shields* v. *Barrow* (17 Howard, 130, 139); *Coiron* v. *Millandon* (19 Howard, 113); *Ribon* v. *Railroad Companies* (16 Wall., 446, 450); *Williams* v. *Bankhead* (19 Wall., 563); *Kendig* v. *Dean* (97 U. S., 423); *California* v. *Southern Pacific Railroad Company* (157 U. S., 229); *New Orleans Water Works Company* v. *New Orleans* (164 U. S., 471, 480). In the case last cited it is said:

> It appears from the bill of complaint—the facts therein set forth being admitted by demurrer—that the city of New Orleans has by

ordinances granted to a large number of corporations, associations, and individuals the privilege of laying pipes in its streets for the purpose of conveying water to their respective premises from the Mississippi. These ordinances, the plaintiff contends, are in derogation of its rights and privileges as heretofore declared and adjudged by this court in the *Rivers and St. Tammany cases.* None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless, the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal, and cancel each ordinance that does not relate to premises contiguous to the Mississippi River, and if the city does not, within such time and in some public way, cancel and annul those ordinances, then that the court, in this suit, shall adjudge and decree them to be null and void as illegally interfering with the rights of the plaintiff.

We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances; for, in the absence of the parties interested and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated every-

where as a nullity. (*Winsor* v. *McVeigh*, 93 U. S., 274, 277; *Pennoyer* v. *Neff*, 95 U. S., 714, 733; *Scott* v. *McNeal*, 154 U. S., 34, 46.)

There is striking similarity between that case and the one at bar. There the plaintiffs sought to have it declared that an ordinance of the city of New Orleans conferring certain privileges upon third parties was without authority of law and void because it violated vested rights of the plaintiffs. Here the plaintiffs seek to have it declared that a decision of the Secretary of the Interior directing that a patent be issued to third parties is without authority of law and void because it violates vested rights of the plaintiffs. There the plaintiffs sought to have the city directed to recall and repeal the ordinance. Here the plaintiffs seek to have the Secretary of the Interior directed to recall his decision and to cause a patent to be issued to them. There those for whose benefit the ordinance was passed were not made parties to the bill. Here those in whose favor the patent is directed to be issued are not made parties. There it was held that in the absence of those for whose benefit the ordinance was passed, and without their having an opportunity to be heard, the court could not grant the relief sought. Here it should be held that in the absence of the town of Las Vegas, to which the Secretary's decision directs that the patent be issued, and without the town having an opportunity to be heard, the court can not grant the relief sought.

A decree granting the relief sought by plaintiffs, rendered in the absence of the town of Las Vegas,

could not be interposed by the defendants as a defense to a like suit by or on behalf of the town, such as *Smith* v. *Reynolds* (9 App. D. C., 261). A court of equity will not thus subject these defendants to the alternating and vexatious suits of adverse claimants for a patent to the same land, but will decline to render a decree at the instance of one adverse claimant in the absence of the other which so far involves and depends upon the rights of the absent one as to leave the entire matter open to further litigation, not only between the defendants and the absent claimant, but also between the claimants themselves. What would be accomplished or settled by such a decree? Of what utility would it be?

It is true that the town would not be precluded by the issuance of a patent to complainants in pursuance of such a decree, and it is equally true that the issuance of patent in pursuance of the decision of the Land Department would not preclude the complainants or prevent the submission of their claim to the proper tribunal. Under these conditions the court should not, in the absence of one of the parties to the controversy, set aside a decision of the executive officers rendered in a controverted case when the only effect would be to shift the burden of attack and to place it upon one who has had no notice of the proceedings to secure that result. If a decree commanding the issuance of a patent to the complainants will not affect the town of Las Vegas to such an extent as to make it an indispensable party to the present bill, it necessarily follows

that the issuance of a patent to the town, in pursuance of the Secretary's decision, will not affect the complainants' interests to such an extent as to entitle them to the interposition of a court of equity to prevent the issuance of a patent to the town.

The complainants seek to avoid this objection to their bill by asserting that there was not at the time of the confirmation, and is not now, any town of Las Vegas capable of receiving title to real property. That question is discussed in another portion of this brief, but even if it be decided in favor of the complainants it would not meet the objection now being made. It is admitted that there is a place designated as Las Vegas where there is a large collection of people—that is, that the town has and had a physical existence. In speaking of this point the court of appeals said (record, p. 28):

> But whether the town of Las Vegas be a municipal corporation, incorporated by virtue of statutory provision or not, is quite immaterial, so far as this case is concerned. In such case as this it would be sufficient that such a number of the proprietors claiming under the grant embracing the town, or of those holding rights thereunder, were brought before the court as would fairly represent the interest of all, the interests being of a common character and responsibility. This principle is established by many authorities, and is treated at large, with the citation of cases, in Story's Equity Pleading, in sections 116 to 126. * * *

Moreover, documents accompanying the report of the surveyor-general show that there are parties inter-

ested in this grant whose interests are of the same character and of equal merit with those of the complainants, but who are not parties either as complainants or defendants in this suit. The bill alleges (Record, p. 2):

> On the 6th day of April, 1835, Jose Jesus Ulibarri, constitutional justice, went upon the ground with the parties, exhibited to them the original petition praying for the grant, pointed out the boundaries as set forth in the petition, and placed them in complete and full possession of all the land contained in said grant; whereupon said grant became and was in all respects valid, and all the land included within the exterior limits of said grant then and there became and was segregated from the public lands of Mexico and of the Territory of New Mexico, and then and there became the private property of said individual grantees, and has ever since *hereto* been and still is the private property of said grantees, their heirs, and lawful assigns.

The fact is, as shown by the papers connected with this grant and submitted to Congress by the surveyor-general, and therefore so presented as to permit the court to take notice thereof, that at various times after the 6th day of April, 1835, and prior to the cession to the United States, lands were set apart and distributed to other parties to the number of at least 153. (H. R. Ex. Doc. 14, Thirty-sixth Congress, first session.) These parties are not mentioned in the bill, but their claims are necessarily denied by the statement quoted above, that the land in question became the private property of the 31 people pres-

ent at the distribution of April 6, 1835, and still is the private property of their heirs and assigns. Should this bill be entertained in the absence of parties thus shown to have an interest in the subject-matter? It is confidently believed that this question must be answered in the negative.

IV.

APART FROM THE MATTERS BEFORE DISCUSSED, COMPLAINANTS' CASE IS WITHOUT MERIT.

A. *The court will not accept complainants' statement of the effect of the act of June 21, 1860.*

It was contended in the courts below that the act of June 21, 1860 (12 Stat., 71), confirming the claim in question, is not a public act, and that the court can not take judicial notice of it. Their position was that, in the consideration of the pending demurrer, the court must accept the statements in the bill as to the force and effect of that act, and can not examine the act to determine whether the bill properly characterizes and describes it. This position is not insisted upon in the brief filed here, and it may be, therefore, that they have concluded to abandon that proposition. The rule is that the insertion in an act, otherwise private, of matter of a public nature renders the act public and subjects it to judicial notice by the courts. (Sutherland on Statutory Construction, sec. 193, and authorities there cited.) This act of 1860 deals with the public lands, as well as with the confirmation of Mexican claims, in that by the sixth section it is provided that one of the claimants for the land involved in this case should, upon relinquishment of that claim, be

allowed to select an equal quantity of vacant land in the Territory of New Mexico.

Another reason why the act of 1860 should be treated as public is that it was passed in discharge of a public political duty resting upon the United States under its treaty with the Republic of Mexico, which is a public law of the land of which the courts must take judicial notice. The acts were thus passed in maintenance of the national honor and in fulfillment of the pledges of national faith given to the Government from which we obtained the territory in which these private claims are located. In this sense such acts are matters of national concern and affect the whole community. In *Tameling* v. *United States Freehold, etc., Company* (93 U. S., 644, 661), Mr. Justice Davis, in delivering the opinion of the court, says:

> We have repeatedly held that individual rights of property in the territory acquired by the United States from Mexico were not affected by the change of sovereignty and jurisdiction. They were entitled to protection, whether the party had the full and absolute ownership of the land or merely an equitable interest therein which required some further act of the Government to vest in him a perfect title. The duty of providing the mode of securing them and fulfilling the obligations which the treaty of cession imposed was within the appropriate province of the political department of the Government.

Whatever may be the character of this act, the complainants have referred to it as the basis of their claim

and thus presented it for the consideration of the court. This is true also of the documents, reports, and decisions referred to by them. Outside of all this, however, facts connected with this grant, which are recited in the statutes and the records of the Interior Department, are matters of which the court can take judicial notice. In *Knight* v. *Land Association* (142 U. S., 161, 168–169), Justice Lamar, in making the statement of the case, said:

> To understand precisely the exact nature of the questions involved in this case a somewhat more detailed statement of facts than is contained in the above findings of the referee will be found useful. These facts are not contradictory of those findings, and are recited in former decisions of this court, statutes of the United States and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice.

The demurrer did not admit as true any allegation in the bill as to the construction or legal effect of this statute, the documents named, or the official acts of the officers of the Government. That is a matter for the court to determine.

B. A consideration of the act of June 21, 1860, and of other matters of which the court takes judicial notice, shows that the claim in question was confirmed to the town of Las Vegas.

It is urged by plaintiffs that the town of Las Vegas is a legal nonentity—that is, that it is not incorporated

and therefore does not have the legal capacity to receive or hold the confirmed title to this claim. That the town has a physical existence now, that it had such an existence at the time of the confirmatory act, and that its establishment was contemplated by the Mexican grant, are not questioned by the bill. By the United States census, of which the court takes judicial notice, Las Vegas had a population of 1,550 in 1850 and 1,094 in 1860. Corporate capacity is not essential to the granting or confirming of lands or other rights to any community, but if it were, the act of Congress confirming this grant to the town gives it the necessary capacity. New Mexico was at the time of the confirmatory act a Territory of the United States, over which Congress had the combined legislative power of a State and the National Government. In *National Bank* v. *County of Yankton* (101 U. S., 129, 132), it is said:

> It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the Territory northwest of the river Ohio to the requirements of the Constitution (1 Stat., 50) is chapter 8 of the first session of the First Congress, and the ordinance itself was in force under the Confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any

State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

The existence of the town of Las Vegas was in terms recognized by the sixth section of the confirmatory act.

It was within the power of Congress to give, and it did give, to the town whatever capacity was necessary to make it the recipient of the intended confirmation. In Dillon's Municipal Corporations, vol. 1, 4th ed., sec. 43 (old sec. 22), it is said:

> If powers and privileges are conferred upon a body of men or upon the residents or inhabitants of a town or district, and if these can not be exercised and enjoyed, and if the purposes intended can not be carried into effect, without acting in a corporate capacity, a corporation is, to this extent, created by implication. The question turns upon the intent of the legislature, and this can be shown constructively as well as expressly.

In vol. 2, sec. 560 (old sec. 431), the same author further says:

> But a grant by the State, or by the sovereign authority having the right to create corporations, to one or more persons who are named as patentees, for themselves and the inhabitants of a designated town, is valid, because the grant itself, coming from this source, confers a capacity to take and hold the lands in a corporate character.

C. *That the town of Las Vegas is the confirmee designated by Congress is believed to be clearly shown in the following departmental decisions relating to this claim.*

In his decision of December 5, 1891 (13 Land Decisions, 646, 655), Secretary Noble said upon this point:

> My opinion is that * * * the confirmation was made direct to the town, not only as

the most convenient form of making said confirmation and issuing patent thereon, but because the town of Las Vegas, acting in the interests and for the benefit of its people, was the proper party to ask for and receive from Congress the relief sought.

* * * A patent for said lands should be issued * * * to the town of Las Vegas, so that the proper parties in interest could perfect their titles to their lands. * * *

The conclusion as to patent arrived at herein seems somewhat to conflict with the views of my predecessor in the Anton Chico case, reported in 1 L. D., 287 (rev. ed.). I have not the entire record in that case before me, and the opinion does not disclose the facts sufficiently to enable me to determine whether they are identical in the two cases. But even if they are the same, I believe it to be my plain duty to cause the patent to issue in the name of the Congressional confirmee—the town of Las Vegas—rather than to other parties not named as confirmee.

As to the point that the town of Las Vegas, not having been incorporated, is a legal nonentity, to which no title would pass under the patent, it may be replied that, if this be true, as a matter of fact and law, the consequences would be more far-reaching; for Congress, in its wisdom, confirmed the grant, as shown, to the said town, and if there be no such town in existence which can take there simply has been no confirmation of the grant, and nobody is as yet entitled to a patent. But I do not understand this to be the law of this case.

Under the Mexican system, originally the people were required, for self-protection and other reasons, to live in towns while cultivating outlying land, and the general laws of that country gave to such towns or pueblos four square leagues of land for the use of the inhabitants thereof, and occasionally by special concession, as in the present instance, grants of larger area were made for the same purpose. None of these towns were ever incorporated, in the sense in which we use the term, so far as my research has gone. They were aggregations of people who lived together for mutual protection, and under the laws and customs of that country had officers for the administration of their municipal affairs; but there was no actual charter—no act of incorporation conferred by the superior power of the State—only the implication arising from the recognition of the existence of such towns, with authority to guide their town affairs.

This was the condition of things when New Mexico was acquired by the United States, and the legal status of these towns and their capacity to take as confirmees of grants of public lands have been recognized in too many instances by Congress and the Executive Departments through too long a period of time to be now seriously questioned.

In the case under consideration the town of Las Vegas was not in existence at the time the original grant was asked for by Maese and his associates. One of the purposes for which the concession was made was to establish that town, and it was established after the manner and

under the laws of Mexico, and has had an actual existence ever since. Congress recognized its legal and actual existence, ignored the original petitioners for the grant and confirmed it to the town, and to that extent made a change in the trustee. In view of all this it is too late now to say that Las Vegas has no legal existence. If a corporate capacity be necessary to enable the town to take under the grant, every presumption must be that it has the necessary corporate capacity, and the law so implies (Dillon on Municipal Corporations, par. 21 and 22). At all events, the town having an actual existence, this Department will not challenge its capacity to take what Congress clearly intended to give.

In passing upon a motion for review of the decision just cited, Secretary Noble further said (15 L. D., 58):

It is strongly insisted that it was error to conclude that the patent should be issued to the town of Las Vegas, because there was no such town in existence at the date the grant was made. If, however, the grant was confirmed to the town, that action of Congress must control this Department. Whether such confirmation was proper or effective is a question that will not be determined here. That the intention of Congress was to confirm the grant to the town of Las Vegas is, in my opinion, clearly disclosed, not only by the reference made to Exhibit A, by which Congress adopted the designation there given of said claim, but also by the whole tenor of the record made while the consideration of the confirmatory act was

progressing, special reference being had in this connection to the report of the Senate committee referred to and quoted from in the former decision. The conclusion reached in that decision and the course to be followed to carry it into execution is one, if not the only, practicable way in which the interest of all parties may be fully protected. It is virtually conceded by the attorneys for the parties now seeking the revocation of the decision of December 5, 1891, that equitable rights in some portions of the property have been acquired "by possession or otherwise," and that such rights should be fully protected. They even profess a readiness and willingness to release their claim to the land within the town of Las Vegas and also of East Las Vegas, and to a large tract surrounding said towns, and to convey the same by quitclaim deed "to the proper legal authorities thereof in the interest and for the benefit of the inhabitants thereof." This proposition can not be seriously entertained even had these parties, which they have not, tendered a formal instrument in furtherance thereof. Indeed, submission of such a proposition is inconsistent with the various allegations made by them as to the effect of conveying the legal title to the town by the Government. It is said in one place: "There was no such town in legal existence at the time of the grant, when the title vested, and there is none now." Again: "But we earnestly oppose the issue of the patent to the 'town of Las Vegas,' because no one can know what is meant thereby." And again: "Our chief objection to the last-named patentee (town of Las

Vegas) is simply that, in such case, no one could find the proper party on whom to serve process to begin a suit for the determination of the ultimate rights of property in the lands patented."

If all these uncertainties and inconveniences would, in their opinion, follow the issuing of a patent in the name of the town, they must believe the same would attach to any title vested in the town by the conveyance proposed. Again, it is said that under a patent issued as they ask, in the names of those asserted by them to have been the original grantees, "any right, legal or equitable, arising under the original grant or subsequent conveyances can be directly asserted, with justice to all and injury to none. It inures to the benefit of the smallest landowner on the grant, and the alleged 'town of Las Vegas' as well." Why all parties would be fully protected if patent should issue as they request and not if it shall issue as directed in the decision complained of is not readily seen, nor am I convinced by the arguments put forward that such is a fact. On the contrary, I am convinced that individual rights and equitable claims may be more readily and surely protected with the legal title so placed that the holder thereof would have no interest in defeating just claims than with it in the hands of individuals whose personal interest would be enhanced by defeating all claims other than their own.

The decision complained of affords to all rightful occupants of the land granted equal and

full protection, those who now claim to be or to represent the original grantees as well as those who claim, through the large number of people who were recognized by the Mexican Government as equally entitled to share in the benefits of said grant. That the grant was not made for the exclusive benefit of those whose names are mentioned as the petitioners therefor is conclusively shown by the history of the governmental action in relation thereto. The grant as ordered made by the Territorial deputation was "not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate." In carrying into execution the orders of the Territorial deputation, the officer intrusted with that duty recognized not only those who were present on the day the first allotment was made, but also others who afterwards presented themselves. This course was pursued at least so long as the land and the occupants thereof were under the jurisdiction of the Mexican Government, and until the number of beneficiaries had increased to nearly two hundred. This course negatives the idea that it was supposed that a grant in fee was being made for the exclusive benefit of the small number of persons referred to in the original petition. The fact that those original petitioners acquiesced in these later distributions, and that one of them, Juan de Dios Maese, officiated at one of these subsequent distributions, shows that these petitioners themselves did not consider that they had been invested with the fee-simple title of all said lands.

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> * * * The history of this grant shows conclusively that it was made for the benefit of all who should see fit to settle thereon, to the end that a town might be established and built up. * * * Congress evidently considered that this intention in making the original grant would be best carried out and individual interest most surely and effectually protected by making the confirmation in the name of the town. However, whatever may have induced the action taken by Congress, it but remains for this Department to carry into execution the legislation enacted, and this can, in my opinion, be done only by issuing the patent in the name of the town, as concluded when the decision complained of was rendered.

In the decision of December 17, 1898 (27 Land Decisions, 683, 687), the execution of which the appellants are now seeking to enjoin, it is said by Acting Secretary Ryan:

> The question as to whom the patent should issue was considered when the matter was before this Department in 1891, and it was then held that it should issue to the town of Las Vegas, inasmuch as the confirmation was made direct to the town. On review it was strongly urged that it was error to hold that patent should issue to the town, but that position was adhered to by the Department. (15 L. D., 58.) The grant as petitioned for was to be to individuals, but as finally made by the territorial deputation provision was made whereby others having no lands should be allowed the same privilege of settling upon the land as those who had petitioned for

the grant. This, like most Spanish and Mexican grants, was made with a view to the establishment of a community for protection against the Indians. It is asserted that the Spanish word "plaza" as used in the papers relating to this grant was erroneously translated "town," as it simply meant a square place. However, that may be, it is certain that the building up of a town was to be expected and actually followed the settlement upon the lands granted. The community was added to until at the time of the cession to the United States more than 200 individuals had been recognized as entitled to share in the benefits of the grant and had been put in possession of tracts of land within the boundaries petitioned for. A town had grown up before the cession to the United States. The petition to the surveyor-general asking for an examination and confirmation of the grant was made by Francisco Lopez, Henry Connelly, and Hilario Gonzales "on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity." The exact interests of the petitioners or the manner in which they became the owners is not set forth. In the report of the surveyor-general, who was by the act of July 22, 1854, *supra*, made a special tribunal to ascertain the origin, nature, character, and extent of such claims and decide as to their validity or invalidity, this grant is spoken of as the "claim of Las Vegas," and in the schedule of cases submitted by him there is a column headed "Names of claimants," and under this head the claimants of No. 20 are designated as

"Town of Las Vegas and Thos. Baca et als." This shows that the surveyor-general regarded the claimant for this grant to be the town.

The Senate committee, in the report heretofore referred to, designate one of the claimants to this grant as "the town of Las Begas or Las Vegas," and say: "This town claims under a grant made on the 25th of March, 1835, to Juan de Dios Maese and twenty-seven others." The act of confirmation, July 21, 1860 (12 Stat., 71), confirmed the claim, with others, as recommended by the surveyor-general. This would be sufficient to justify the conclusion that the confirmation was to the town, but this conclusion is further supported by the fact that, in providing for the heirs of Baca, Congress specifically said that the land to be selected by them should be in place of the land "claimed by the town of Las Begas." It seems clear from all this that the confirmation was intended to be to the town.

The declaration of Congress as to the confirmee is accepted by this Department. If Congress had made a grant to the town of Las Vegas, there would have been no room for discussion as to whom the patent should issue. The Supreme Court has said that an act of confirmation passes the title of the United States as effectually as if it contained in terms a grant *de novo*. *Ryan et al.* v. *Carter et al.* (92 U. S., 78). The title to this land passed by the confirmatory act, and the recipient thereof was the confirmee indicated by the act. This was the town of Las Vegas, and to that confirmee must the patent issue.

That the people composing the town were understood to be the confirmees is shown by various annual reports of your predecessors, where, in giving a list of private land claims, under the heading "confirmee" or "present claimant," the phrase "inhabitants of town" is used. The question as to the proper patentee has been twice considered by this Department, and both times it was held to be the town. (13 L. D., 646; 15 L. D., 58.) By the decree rendered by the supreme court of the District of Columbia in the suit heretofore mentioned it was adjudged that the lands contained in said grant "were absolutely and unconditionally confirmed to the said town of Las Vegas, and that said town became and is the absolute owner thereof in fee." Upon appeal this decree was affirmed by the court of appeals.

It is thus seen that the uniform holding has been that the town of Las Vegas is the confirmee and owner of the lands embraced in this grant.

For the reasons herein set forth it must be held that said grant was confirmed to the town of Las Vegas.

D. *Confirmatory patent must follow act of confirmation. Neither Land Department nor courts can revise action of Congress.*

If plaintiffs claim adversely to the confirmation made by Congress, their rights are fully protected by the provision in the confirmatory act that the confirmation "shall not affect the adverse rights of any other person or persons whomsever;" but if they claim under that confirmation they must receive its benefits through

the confirmee or instrumentality named by Congress—namely, the town of Las Vegas. It is not competent for the Land Department or for a judicial tribunal to review the action of Congress in making the confirmation to the town. In speaking of another confirmation made by the act of 1860, this court said, in *Tameling* v. *United States Freehold, etc., Company* (93 U. S., 644, 662):

> *The final action on each claim reserved to Congress is of course conclusive, and therefore not subject to review in this or any other forum.*

To the same effect is the *Maxwell Land-Grant Case* (121 U. S., 325, 365).

In *Smith* v. *Reynolds* (9 App. D. C., 261, 285) the court of appeals, in considering the Congressional confirmation of this claim, said:

> What Congress has declared must be accepted as conclusive in all matters relating to the disposition of the public lands, whether it be in the form of confirmation of previous grants or the granting of land in exchange for the surrender and relinquishment of prior titles to make good a junior or subordinate grant. Where Congress has acted in either confirming or rejecting a land claim, all other jurisdictions are excluded except where other jurisdiction is expressly conferred.

It is respectfully submitted that the decrees of the courts below were right and should be affirmed.

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